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IN THE

Supreme Court of the United States

October Term, 1965

No. 698

ERNEST O. D. CAMPBELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on September 28, 1965.

Citations to Opinions Below

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra,* p. 25, has not yet been reported. The judgment of the District Court is also unreported and is printed in Appendix B hereto, *infra,* p. 23.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on September 28, 1965. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. In a prosecution for tax evasion under § 7201 of the Internal Revenue Code of 1954 (26 U. S. C. § 7201) (hereinafter I. R. C. (1954)), was petitioner barred from asserting as a defense accrued foreign tax credits pursuant to I. R. C. (1954) § 901 sufficient to eliminate any substantial tax deficiency for the critical years in the indictment solely because of petitioner's failure to claim the tax credit promptly and to disclose his foreign income in his returns for those years?

2. Where all of the taxable events giving rise to petitioner's liability for foreign taxes occurred during 1955 and 1956 and where petitioner's liability for those taxes was finally determined by the foreign tax authorities prior to the indictment, had the foreign tax "accrued" within the meaning of I. R. C. (1954) § 905(a), thereby eliminating any substantial tax deficiency for the years 1955 and 1956?

Statutes Involved

The United States statutes involved are 18 U. S. C., § 1001, and the Internal Revenue Code of 1954 (I. R. C. (1954)), §§ 901(a), (b), 904(a), 905(a), (b), 7201. The Canadian statutes involved are Canadian Income Tax Act of 1948, §§ 58-60, C. 52, S. 53-55, III Can. Rev. Stat. c. 148 (1952). They are printed in Appendix A, *infra*, pp. 17-22.

Statement

Petitioner prays that this Court review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York, convicting petitioner after a jury trial on four counts of an indictment alleging violations of I. R. C. (1954) § 7201 and on

one count (Count IV of the indictment) alleging a violation of 18 U. S. C. § 1001.

Petitioner, who was 69 years old at the time of his conviction (R. 57a)[1], was sentenced on December 16, 1964 to imprisonment for 1 year and 1 day on each count, the sentences to run concurrently with the provision that pursuant to 18 U. S. C. § 4208(a)(2) petitioner should be eligible for parole at such time as the Board of Parole might determine.[2] Petitioner was released on bail of $25,000 pending appeal, and petitioner's motion for a stay of the mandate pending this Court's final determination and disposition of this case was granted on October 22, 1965.

Under Count I of the indictment, filed April 12, 1962, the prosecution alleged income tax deficiencies for the year 1955 in the amount of $237,835.59 (R. 2a) and adduced proof that the deficiency was $211,277.15 (R. 27a). Under Count II the government alleged and adduced proof of an income tax deficiency of $30,365.74 for the year 1956 (R. 3a, 27a). These deficiencies were attributable almost exclusively to petitioner's failure to include on his 1955 and 1956 United States income tax returns profits from the sale of certain Canadian securities namely, Campbell-Chibougamau, Limited (G. Ex. 251, R. 150a-151a).

It is undisputed that the profits from the sale of those securities were not in fact reported on petitioner's 1955 and 1956 United States income tax returns. Petitioner, however, attempted to show that under § 901 of the Internal Revenue Code of 1954, he was entitled during each of these taxable years to take as a tax credit against his United

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[1] References denote pages of Appendix to Appellant's [Petitioner's] Brief in the Court of Appeals. "D. Ex." is used to denote defendant's exhibits, "G. Ex." to denote Government's exhibits.

[2] The Court also fined petitioner $5,000 on each of Counts I, II and IV, the fines totaling $15,000, and sentenced him to pay ½ of the costs of the prosecution on Counts I and II.

States income tax, accrued Canadian income taxes assessed on profits from the sales of those securities. Allowance of those credits, amounting to $212,246.50 and $28,181.27 respectively for the years 1955 and 1956, would have resulted in an overpayment by petitioner of $544.78 for 1955 and an underpayment of $2,184.47 for 1956.[3]

The Canadian government had assessed petitioner $802,009.60 in income taxes for his profits on the sale of Campbell-Chibougamau, Limited stock in 1955 and $53,725.73 in income taxes for his 1956 profits on the sale of those shares (D. Ex. Q., R. 152a-153a; D. Ex. AB, R. 158a-159a; D. Ex. R. for id., R. 155a). Petitioner contested his 1955 Canadian assessment by filing a notice of objection (G. Ex. 9, R. 132a-133a), but in 1961 the Income Tax Appeal Board of Canada ruled against petitioner, determining that he owed the Canadian government $802,009.66 in Canadian taxes for 1955 (D. Ex. R for id., R. 154a-156a; JN, pp. II-VI).[4] No appeal was ever taken by petitioner from the

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[3] The computation of the available credit and of the overpayment of petitioner's 1955 tax and underpayment of his 1956 tax are based upon Defendant's Exhibit AX for identification (R. 182a-183a) prepared by petitioner's expert in accordance with the provisions of I. R. C. (1954) § 904(a) and excluded at the trial (R. 92a-94a, R. 120a). If computations were made on the basis of the Government's proof, the amount of overpayment by petitioner for 1955 would be greater. There would be no change for 1956.

[4] Some of the facts showing that petitioner's Canadian tax liabilities for the years 1955 and 1956 were finally determined prior to the indictment or trial in this case were not presented to the trial court. The original certificates by officials of the Canadian Government attesting to the contents of official records of the Canadian Government regarding petitioner's Canadian income tax liabilities were handed up to the Court of Appeals and copies thereof were printed as a supplement to petitioner's brief in the Court of Appeals. In order to make clear that this material is before the Court not as part of the official record of the trial below, references thereto will be prefixed with the letters "JN". Both the original certifications handed up to the Court of Appeals and copies of the supplement to petitioner's brief in the Court of Appeals have been furnished to this Court. Page references are to the pages in that supplement.

decision of the Income Tax Appeal Board with respect to 1955 and its determination became final before the indictment in this case was filed (R. 2a; D. Ex. R. for id., R. 154a-156a; JN, pp. II-XI).

No notice of objection was served by petitioner in response to the notice of assessment for his 1956 Canadian income taxes (JN, pp. XII-XV). Thus, petitioner's liability for his 1956 Canadian income taxes also was finally determined prior to the indictment in this case (D. Ex. R. for id., R. 154a-156a; JN, pp. XII-XV).

The Court of Appeals appeared to agree with petitioner's contention that the convictions on Counts I and II could not stand if, in fact, the Government had failed to prove that petitioner had substantial tax deficiencies for the years 1955 and 1956. Nevertheless, the Court of Appeals affirmed petitioner's convictions on these counts on the apparent grounds that petitioner was not entitled to assert the foreign tax credit defense because (1) he had failed to report his foreign income on his 1955 and 1956 income tax returns and (2) petitioner's 1955 and 1956 Canadian income tax liabilities had not "accrued" within the meaning of I. R. C. (1954) § 905(a) (Appendix B, *infra*, pp. 29-32). The District Court had ruled that the petitioner was not entitled to assert its tax credit defense to Counts I and II of the indictment because, in the view of the District Court, there had been no "final determination" of petitioner's Canadian tax liability for the years 1955 and 1956 prior to the indictment (R. 39a).

The remaining counts of the indictment require only brief comment. Counts III and V charge petitioner with tax evasion for the years 1957 and 1958 (R. 3a-4a; R. 5a); Count IV of the indictment charges petitioner with making an allegedly false statement in his 1957 tax return (R. 4a-5a). Nevertheless, it is clear that Counts I and II were the major part of the prosecution's case and that if the convictions on Counts I and II are reversed, Counts III,

IV and V would also fall in light of the manifestly inordinate impact on them of the evidence adduced with respect to Counts I and II. This is clearly shown by the prosecution's emphasis, both in arguments and exhibits, the trial court's charge to the jury, the trial court's stated view of the case and the actual sentence imposed (R. 7a-8a, 12a, 36a, 37a, 125a, 127a, 130a, 138a-139a, 148a-149a). Indeed, when petitioner's tax credit defense to Counts I and II was raised, the trial judge noted that if this defense was valid:

> ". . . We better stop the case right away. We are wasting the taxpayers' money by continuing the trial." (R. 36a).

And the Court of Appeals apparently agreed with petitioner in this regard, devoting all but a small fraction of its opinion to a discussion of Counts I and II and dismissing petitioner's arguments directed at the other counts only "once his convictions on counts I and II are upheld" (Appendix B, *infra*, p. 34). See also *Flemister* v. *United States*, 260 F. 2d 513, 518 (5th Cir. 1958); *United States* v. *Hines*, 256 F. 2d 561, 563 (2d Cir. 1958).

Reasons for Granting the Writ

1. The decision of the Court below is in direct conflict with the decision of this Court in *Sansone* v. *United States*, 380 U. S. 343 (1965). Moreover, by ignoring the Court's holding in *Sansone*, the opinion of the Court below raises the very Constitutional questions laid to rest by the *Sansone* decision.

In *Sansone* this Court held that §§ 7201 and 7207 of the Internal Revenue Code of 1954 involved different offenses, with differing elements. Section 7207, which provides that the filing of a false return is a misdemeanor, was held violated by the willful filing of a false return. To sustain its burden under § 7201, however, the Government was re-

quired to show in addition that any material misstatement by a taxpayer on his return resulted in a substantial income tax deficiency.

In holding that petitioner was not entitled to assert as a defense his claim of a tax credit because he had not made "full disclosure of *all* foreign income" on his "initial *return* or by a prompt amendment" (Appendix B, *infra*, pp. 29-30), the rationale of the Court below is in direct conflict with this Court's holding in *Sansone*. Petitioner's tax credit defense was offered to show the absence of a substantial tax deficiency in the critical indictment years. The Court below thus precluded petitioner from showing the absence of a substantial tax deficiency on the ground that petitioner had filed a false return, a holding directly in conflict with this Court's holding in *Sansone*.[5]

In holding as it did, the Court of Appeals revived the Constitutional issues which had first been raised in *Berra* v. *United States*, 351 U. S. 131 (1956), and again in *Achilli* v. *United States*, 353 U. S. 373 (1957), and which this Court put to rest in *Sansone*. In both *Berra and Achilli*, petitioners had argued that §§ 145(b) and 3616(a) of the 1939 Code, the predecessors of §§ 7201 and 7207 of the 1954 Code, required identical proof. If they were considered identical, serious Constitutional issues might have been presented:

> "The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616.

[5] Petitioner was not indicted for filing a false return.

I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to be to be wholly incompatible with our system of justice. . . .

• • •

"A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v. Hopkins, 118 U. S. 356, 370.

"A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. Of course it is true that under our system Congress may vest the judge and jury with broad powers to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. . . .

"The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same." *Berra* v. *United States*, 351 U. S. 131, 138-140 (1956) (dissenting opinion of Justices Black and Douglas).

In *Berra* the majority of the Court found it unnecessary to reach these Constitutional issues because petitioner there had failed in the trial court to make any motion

"addressed to the validity of the indictment, judgment of conviction, or sentence. . . ." *Berra* v. *United States*, 351 U. S. at 132-33, 137. In *Achilli*, this Court held that § 3616(a) of the 1939 Code (the predecessor of § 7207 of the 1954 Code) did not apply to income tax returns; thus, again the Court was not required to deal with the Constitutional issues.

In *Sansone*, this Court held that, unlike its predecessor, § 7207 of the 1954 Code did apply to income tax returns. However, it laid to rest the Constitutional questions presented in the earlier cases by its holding that the felony and misdemeanor statutes (§§ 7201 and 7207) were not identical because the felony section required proof of a substantial tax deficiency.

Thus, in holding that proof of a violation of § 7207 (petitioner's failure to report his foreign income) precluded petitioner from defending against a charge under § 7201 on the ground that nevertheless there was no substantial tax deficiency, the Court below ignored this Court's holding in *Sansone* and revived the very Constitutional issues there laid to rest.

2. The Court of Appeals in effect held that petitioner was not entitled to assert his foreign tax credit defense because his foreign tax liability had not "accrued" at the time of the filing of his 1955 and 1956 United States income tax returns. Petitioner respectfully submits that the Court below erred in this matter of first impression, misconceiving the nature and purpose of the foreign tax credit.

As this Court noted in *Sansone* v. *United States, supra*, in a case charging income tax evasion under § 7201 of the 1954 Code, the Government must show that a substantial tax remains due and owing for the taxable year in question. The lower courts have long applied this principle in permitting defendants charged with income tax evasion to

show the existence of previously unclaimed deductions which would eliminate any substantial tax deficiency for an indictment year. See *Koontz* v. *United States,* 277 F. 2d 53 (5th Cir. 1960); *Elwert* v. *United States,* 231 F. 2d 928, 932 (9th Cir. 1956); *Schenck* v. *United States,* 126 F. 2d 702, 704 (2d Cir. 1942); *United States* v. *Miro,* 60 F. 2d 58 (2d Cir. 1932).

The Court below, however, refused to follow this line of cases. Ruling that allowance of the foreign tax credit depends on a taxpayer's promptly claiming the credit and making a "full disclosure of all foreign income" in his "initial *return* or by a prompt amendment" (Appendix B, *infra,* pp. 29-30), the Court refused to allow petitioner to "rewrite his 1955 [sic] return" on a "*nunc pro tunc* basis" (*Id.* at p. 31) absent proof that petitioner had made a "timely and full initial disclosure of all foreign income" (*Id.* at p. 30). Instead, the Court held:

> "It would be anomalous to allow criminal responsibility under United States law for *an otherwise consummated crime* to depend absolutely on the subsequent and possibly fortuitous imposition of tax liability under foreign law. *Willingham* v. *Commissioner,* 289 F. 2d 283 (5th Cir. 1961), *cert. denied,* 368 U. S. 829 (1961)." (Emphasis supplied) (Appendix B, *infra,* p. 30).

Thus, in relying on *Willingham,* and in analogizing the foreign tax credit to the loss carry back, the Court of Appeals implicitly (or perhaps explicitly) held that petitioner's tax evasion was complete at the time of filing his 1955 and 1956 returns and that, therefore, at least some of the taxable events giving rise to the allowance of a foreign tax credit must have occurred subsequent to the years for which the tax credit was claimed. In *Willingham,* which involved a prosecution for tax evasion for the years 1952 and 1953, the Court rejected the defendant's attempt to

assert as a defense a loss sustained in 1955 which, under the predecessor to § 172 of the 1954 Code, he was entitled to "carry back" to 1953. The Court concluded that the crime of tax evasion was complete when a fraudulent return was filed if ". . . with all benefits arising *out of events up to that time* taken in his [taxpayer's] favor there would still be a tax due by him but for the fraud." (Emphasis supplied.) (289 F. 2d at 288.)

It is respectfully submitted that the Court's analogy to the loss carry back cases is inapposite because it misconceives the nature and purpose of the foreign tax credit. The foreign tax credit, granted by § 901 of the 1954 Code (Appendix A, p. 17) permits, with limitations not here relevant, United States citizens to take as a credit against their United States income tax:

> ". . . the amount of any income . . . taxes paid or accrued during the taxable year to any foreign country. . . ." I.R.C. (1954) §901(b)(1).

The purpose of the foreign tax credit is to prevent double taxation of income which United States citizens earn abroad. Since the United States may and in most cases does tax its citizens on all of their income, wherever earned, those who earn income in foreign countries subject to foreign income tax may be subjected to the burden of double taxation. Without relief, this burden could amount to cumulative taxes in execess of 100% of income. See generally Owens, THE FOREIGN TAX CREDIT (Harvard Law School, 1961) pp. 2-3. In order to avoid this unreasonable result, Congress has recognized that such foreign income is primarily subject to foreign taxes, which in turn may, as accrued, be taken as a credit against United States income taxes.

The theory underlying the allowance of the foreign tax credit suggests, and the statute makes clear, that the foreign

tax credit may be taken for the year in which it has accrued, whether the taxpayer is on a cash or accrual basis. See I.R.C. (1954) § 905(a). It is indisputable that an uncontested income tax accrues in the year for which it was levied. See *Fawcus Machine Co.* v. *United States*, 282 U. S. 375 (1931); *United States* v. *Anderson*, 269 U. S. 422 (1925). A deduction for a contested domestic income tax must be taken against income for the year the tax is finally determined. *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516 (1944). But a credit for a contested foreign tax may be taken against the United States tax for the year for which the foreign tax was levied. It relates back to the taxable year for which the foreign tax was in dispute no matter when the final determination of the contest was made. Rev. Rul. 58-55, 1958-1 Cum. Bull. 266, 267.

Thus, it is indisputable that appellant's foreign tax liabilities for the years 1955 and 1956 arose out of "events up to" the time he filed his United States returns for those years. Clearly, the foreign tax liability arises out of and is determined by the fact of foreign income during the taxable year in question. Concededly, payment of the foreign taxes may be postponed until a final determination of the foreign tax liability is made by the appropriate officials of the foreign government, but that decision is merely declaratory of a tax liability which was fixed by events occurring entirely in the year for which the foreign tax was levied.

Indeed, this reasoning compelled the Board of Tax Appeals many years ago to conclude that a foreign tax can be accrued in the year for which the tax was levied even if a foreign tax liability was being contested by the taxpayer:

> " . . . If all the events have occurred 'which fix the amount of the tax and determine the liability of the taxpayer to pay it' it must be accrued [citing cases]. . . .

"...

"... The fact that petitioner denied that it owed the Canadian Government any tax does not make its liability contingent. ... The amount of the tax and petitioner's liability for the payment thereof were fixed by the laws of the Dominion of Canada. The amounts could have been ascertained by petitioner and accrued upon its books at the end of each of the years. If proper accrual had been made the amount would have been deductible, at petitioner's election ... or a credit against its taxes due to the Federal Government could have been claimed in its returns of income [for the years for which the foreign taxes were levied]. ..." *Hygienic Products Co.*, 37 B.T.A. 202, 206-207 (1938), *aff'd*, 111 F. 2d 330 (6th Cir.), *cert. denied*, 311 U. S. 665 (1940).

Moreover, § 905(a) of the Code provides that the foreign tax credit may be taken "in the year in which the taxes of the foreign country ... accrued. ..." Since the year in which the credit may be taken has been authoritatively ruled to be the year in which the facts giving rise to the foreign tax liability occurred (Rev. Rul. 58-55, 1958-1 Cum. Bull. 266), it follows that for purposes of Section 905(a) the year in which the foreign tax is accrued is also the year in which the facts giving rise to that liability occurred. It follows further, therefore, that the facts relevant to determining whether or not a foreign tax liability has accrued must be determinable at the end of the taxable year in which it is alleged the facts giving rise to the liability took place. Cf. *Hygienic Products Co., supra*, 37 B. T. A. 202 at 207.

Finally, it is significant that Treas. Reg. § 1.901-1(d) explicitly permits a taxpayer to claim the foreign tax credit after filing his return; indeed, this claim may be made during the same period available to a taxpayer for claiming

deductions. See I. R. C. (1954) § 6511. This is in sharp contrast to those benefits which a taxpayer must elect at or before the time he files his return. See, *e.g.*, I. R. C. (1954) § 1372(c)(1) (election to be taxed as a "small business corporation"); Treas. Reg. § 1.472-3 (election with respect to inventory accounting methods); Treas. Regs. §§ 1.263(c)-1, 1.612-4(d), 1.615-3(b).

Thus, we submit, the availability of the foreign tax credit to eliminate an alleged tax deficiency in a prosecution for income tax evasion is directly analogous to the availability of deductions to accomplish the same purpose under the rationale of *Koontz* v. *United States, Elwert* v. *United States, Schenck* v. *United States* and *United States* v. *Miro, supra* at p. 10. The analogy to *Willingham,* adopted by the Court below in this case of first impression, is erroneous in logic and law and should not be permitted to stand without further scrutiny by this Court.

The District Court approached the problem somewhat differently than did the Court of Appeals. It held throughout the trial that petitioner would be entitled to assert this defense upon a showing that his foreign tax liability had been paid, conceded or finally determined prior to the indictment. (*E.g.,* R. 39a.) The Government, too, initially conceded that the doctrine of *Koontz* v. *United States, supra,* was applicable even with respect to facts occurring after the filing of the return but prior to the indictment.[6]

To meet the test posited by the District Court, petitioner offered evidence both in that Court and, to some extent, for the first time in the Court of Appeals showing

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[6] "Where all the facts to support a claim by a defendant of overpayment rather than underpayment existed at the time of the alleged evasion *or of the indictment,* such a claim is of course, highly relevant. That is the thrust of *Koontz* v. *United States,* 277 F. 2d 53 (5th Cir. 1960) . . ." (Emphasis supplied) (Government's Memorandum of Law, p. 5.)

beyond peradventure that petitioner's Canadian income tax liability for 1955 and 1956 was finally determined prior to the indictment in amounts sufficient to eliminate any substantial United States tax deficiencies for those years.

Petitioner submits, therefore, that the Court of Appeals erred in concluding that he failed to demonstrate that his Canadian tax liabilities had been determined prior to the indictment. While it is not clear whether the Court of Appeals expressly took judicial notice of the facts contained in the documents presented in the supplement to petitioner's brief in that Court (JN, pp. I-XV), the opinion of the Court of Appeals at least makes clear that those documents were considered (Appendix B, *infra*, pp. 31-32). However, in stating that the document offered by petitioner "to the effect that an appeal has been dismissed" was insufficient to show that his 1955 Canadian tax liability was "paid or accrued," the Court of Appeals manifestly misconstrued the incontestable facts presented to it. Thus, the evidence was undisputed that petitioner had been assessed $802,009.60 for the year 1955 by the Canadian tax authorities (D. Ex. Q, R. 152a-153a); that on June 27, 1961 the Income Tax Appeal Board of Canada dismissed petitioner's appeal from that assessment (JN, p. V); and that no appeal was taken by petitioner from the judgment of the Income Tax Appeal Board of Canada to the Exchequer Court of Canada within the time prescribed by the law of Canada for such an appeal. [JN, pp. IV, X; § 60(1), Income Tax Act of 1948, C. 52, S. 55, III Can. Rev. Stat. c. 148 (1952) (Appendix A, pp. 21-22)].

Similarly, the documents presented at the trial, together with those presented to the Court of Appeals, make clear that petitioner's liability for his 1956 assessment of $53,725.73 by the Canadian tax authorities (D. Ex. AB, R. 158a-159a) was finally determined when petitioner failed within 60 days after the mailing of that notice of assessment to him in June, 1958 to serve a notice of objection to that

assessment, such notice being prerequisite to an appeal to either the Income Tax Appeal Board or the Exchequer Court of Canada. [JN, p. XIV; §§ 58, 59, 60(2), Income Tax Act of 1948, C. 52, S. 53-55, III Can. Rev. Stat. c. 148 (1952) (Appendix A, pp. 20-22)].

Thus, petitioner's Canadian tax liabilities for 1955 and 1956 were finally determined well prior to April 12, 1962, the date of the indictment. Although petitioner has demonstrated that a foreign tax accrues at an earlier date, even the government has never disputed that a foreign tax accrues when liability therefore has been finally determined by foreign tax authorities. Cf. Rev. Rul. 58-55, 1958-1 Cum. Bull. 266. It must follow therefore that even if the District Court's formulation of the applicable law was correct, petitioner met the burden imposed upon him by that court and he should have been allowed to assert the foreign tax credit as a defense to the instant prosecution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 1965.

APPENDIX A

Statutes Involved *

United States Statutes

Internal Revenue Code of 1954, § 901(a) & (b)(1) (26 U. S. C. § 901(a), (b)(1)):

Sec. 901. Taxes of Foreign Countries and of Possessions of United States.

(a) ALLOWANCE OF CREDIT.—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable year under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) AMOUNT ALLOWED.—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) CITIZENS AND DOMESTIC CORPORATIONS.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

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* All statutes quoted *infra* are those currently in effect. Amendments to these statutes since the period covered by the indictment are not relevant to these proceedings.

Internal Revenue Code of 1954, § 904(a) (26 U. S. C. § 904(a)):

Sec. 904. Limitation on Credit.

(a) ALTERNATIVE LIMITATIONS.—

(1) PER-COUNTRY LIMITATION.—In the case of any taxpayer who does not elect the limitation provided by paragraph (2), the amount of the credit in respect of the tax paid or accrued to any foreign country or possession of the United States shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources within such country or possession (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

(2) OVERALL LIMITATION.—In the case of any taxpayer who elects the limitation provided by this paragraph, the total amount of the credit in respect of taxes paid or accrued to all foreign countries and possessions of the United States shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

Internal Revenue Code of 1954, § 905(a) & (b) (26 U. S. C. § 905(a), (b)):

(a) YEAR IN WHICH CREDIT TAKEN.—The credits provided in this subpart may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued, subject, however, to the conditions prescribed in subsection (c). If the taxpayer elects to take

such credits in the year in which the taxes of the foreign country or the possession of the United States accrued, the credits for all subsequent years shall be taken on the same basis, and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year.

(b) PROOF OF CREDITS.—The credits provided in this subpart shall be allowed only if the taxpayer establishes to the satisfaction of the Secretary or his delegate—

(1) the total amount of income derived from sources without the United States, determined as provided in part I,

(2) the amount of income derived from each country, the tax paid or accrued to which is claimed as a credit under this subpart, such amount to be determined under regulations prescribed by the Secretary or his delegate, and

(3) all other information necessary for the verification and computation of such credits.

For purposes of this subpart, the recipient of a royalty or other amount paid or accrued as consideration for the use of, or for the privilege of using, copyrights, patents, designs, secret processes and formulas, trademarks, and other like property, and derived from sources within the United Kingdom of Great Britain and Northern Ireland, shall be deemed to have paid or accrued any income, war-profits and excess-profits taxes paid or accrued to the United Kingdom with respect to such royalty or other amount (including the amount by which the payor's United Kingdom tax was increased by inability to deduct such royalty or other amount) if such recipient elects to include in its gross income the amount of such United Kingdom tax.

Internal Revenue Code of 1954, § 7201 (26 U. S. C. § 7201):

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

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18 U. S. C. § 1001:

Sec. 1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Canadian Statutes

Canadian Income Tax Act of 1948, §§ 58-60, C. 52, S. 53-55, III Can. Rev. Stat. c. 148 (1952):

Sec. 58. Objections to Assessment.

(1) A taxpayer who objects to an assessment under this Part may, within 60 days from the day of mailing of the notice of assessment, serve on the Minister a notice

of objection in duplicate in prescribed form setting out the reasons for the objection and all relevant facts.

(2) A notice of objection under this section shall be served by being sent by registered mail to the Deputy Minister of National Revenue for Taxation at Ottawa.

(3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail.

Sec. 59. Appeals to Income Tax Appeal Board.

(1) Where a taxpayer has served notice of objection to an assessment under section 58, he may appeal to the Income Tax Appeal Board constituted by Division I to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 180 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that he has vacated or confirmed the assessment or re-assessed;

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 58 that the Minister has confirmed the assessment or re-assessed.

(2) Service of a notice of appeal under this section and all other matters in connection with an appeal under this section, shall be regulated by Division I.

Sec. 60. Appeals to the Exchequer Court.

(1) The Minister or the taxpayer may, within 120 days from the day on which the Registrar of the Income

Tax Appeal Board mails the decision on an appeal under section 59 to the Minister and the taxpayer, appeal to the Exchequer Court of Canada.

(2) Where a taxpayer has served a notice of objection to an assessment under section 58, he may, in place of appealing to the Income Tax Appeal Board under section 59, appeal to the Exchequer Court of Canada at a time when, under section 59, he could have appealed to the Income Tax Appeal Board.

(3) All matters in connection with an appeal under this section shall be regulated by Division J.

APPENDIX B

Judgment and Commitment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

ERNEST O. D. CAMPBELL,

Defendant.

On this 16th day of December, 1964 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty by a jury of the offense of unlawfully, wilfully and knowingly filing and causing to be filed false and fraudulent income tax returns for the calendar years 1955, 1956, 1957 and 1958 (Title 26, U. S. Code, Section 7201); unlawfully, wilfully and knowingly making and using and causing to be made and used a false U. S. Individual Income Tax Return for the calendar year 1957, knowing the same to contain a false, fictitious and fraudulent statement and entry (Title 18, U. S. Code, Section 1001) as charged in 5 Counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year and One (1) day on each of Counts 1, 2, 3, 4 and 5 to run concurrently with each other, with the provision that pursuant to Title 18, U. S. Code, Section 4208(a)(2) the defendant shall become eligible for parole at such time as the Board of Parole may determine and

IT IS ADJUDGED that the defendant is Fined $5,000 on each of Counts 1, 2 and 4. Fines Totalling $15,000 to be paid by January 15, 1965 or defendant to be committed until fines are paid or he is otherwise discharged according to law, and

The defendant to pay one-half the costs of the prosecution on each of Counts 1 and 2.

The defendant is continued on his present bail until January 15, 1965, at which time he shall surrender to the United States Marshal to begin service of his prison sentence.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD PALMIERI,
United States District Judge.

JAMES E. VALECHI,
Clerk.

Opinion of United States Court of Appeals for the Second Circuit

No. 473—September Term, 1964

(Argued May 5, 1965 Decided September 28, 1965)

Docket No. 29463

UNITED STATES OF AMERICA,

Appellee,

against

ERNEST O. D. CAMPBELL,

Defendant-Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of conviction upon a trial before the court, Edward Palmieri, *Judge,* and a jury in the Southern District of New York for making false and fraudulent income tax returns for the years 1955 through 1958 in violation of 26 U. S. C. § 7201 and 18 U. S. C. § 1001.

Affirmed.

RICHARD A. GIVENS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., David M. Dorsen, Assistant United States Attorney, Southern District of New York, of counsel), *for Appellee.*

LEON SILVERMAN, New York, N. Y. (Strasser, Spiegelberg, Fried and Frank, Victor S. Friedman, Stephen Fraidin, Daniel C. Schaffer, New York, N. Y., of counsel), *for Defendant-Appellant.*

MOORE, *Circuit Judge:*

The defendant, Ernest O. D. Campbell, appeals from a judgment of conviction, after a jury verdict, on five counts of an indictment charging him with a wilful attempt to evade United States income taxes for 1955 through 1958 in violation of Section 7201 of the Internal Revenue Code of 1954 (the Code) (counts I-III and V) and on one count alleging that he had made a wilful false statement on his 1957 federal tax return in violation of Section 1001 of the Code (count IV).

Campbell, a United States citizen, moved to Canada in 1945. His conviction arises from his treatment of the United States income tax aspects of several stock transactions: (1) failure to report profits of approximately $1,194,394.75 in 1955 and $117,833.74 in 1956 from the sale of his large blocks of stocks in Campbell-Chibougamau, Ltd., a Canadian mining corporation which Campbell had helped to form (counts I and II); (2) failure to report the receipt in 1957 of some $3,000 (count III); (3) the false report of a "sale" to his wife of Ford Highwood Collieries, Ltd. stock for $19,657.91, which Campbell and his wife had purchased originally in 1956 for $133,000 (count IV); and (4) the false report of a "loss" on this sale of $112,000 of the original purchase price of the Ford Highwood Collieries, Ltd. stock as a carry-over deduction on his income tax return for 1958 (count V).

Citizenship

Campbell in August 1956 best describes his own status to the Canadian Department of National Revenue: "I am, and always have been a citizen of the United States, and whatever income I earned in Canada, I included in my returns for the aforementioned years [1954-1955], which I filed in New York," and specifically for 1955 "In 1955, the taxpayer [Campbell] was and still is a non-resident of Canada, being domiciled in the State of New York, U. S. A."

1955

As a citizen of the United States and a resident of New York State, Campbell was under a legal obligation to file a federal income tax return for 1955. He did so, reporting an adjusted gross income of $8,859.99 but failed to report long-term capital gains of $845,056.60, arising primarily from sales in the United States and Canada of stock of Campbell-Chibougamau Mines, Ltd. owned by him. Upon a recomputation of the tax due, the Government calculated that the true adjusted gross income should have been $433,910.99. The Government alleged a tax deficiency of $237,835.59 of which it proved $211,277.15.

Campbell had long been well versed in figures, first as a bookkeeper in Wall Street and then as a stock broker for some 30 to 35 years. He did not report his huge capital gains because he regarded them as resulting from Canadian transactions. Under Canadian law, there was no tax on capital gains. When it served his tax convenience, Campbell was a resident of Canada and, when Canada approached him with the suggestion of paying taxes there, he quickly signed whatever statements were necessary to proclaim that he was a non-resident of Canada and domiciled in New York. These statements (a "form" he called it) he attributes to his lawyers anxious to defend him against a Canadian tax.

Campbell upon this appeal does not contest his wilful failure to include large amounts of income (capital gains) in his return but bases his case here, as he did throughout the trial, on the claim that actually and in retrospect

Canadian tax assessments for the years 1955 and 1956 should be regarded as taxes paid or accrued during the taxable year to a foreign country and, hence, a deduction under the tax form item "8. Tax credits * * * (a) Credit for income tax payments to a foreign country or U. S. possession (Attach Form 1116)." Thus, argues Campbell, if the Canadian assessment qualifies for the credit under the category "paid or accrued" (which he asserts it does) then any United States tax is wiped out. His conclusion is that no matter how fraudulent and wilful were his efforts to cheat both countries of any tax on his huge gains, he cannot be convicted of evading or defeating a tax which never came into being.

Despite his detailed arguments, however, Campbell is not entitled to the credit and his convictions on counts I and II of the indictment must be affirmed on the basis of deficiencies in his reported tax for 1955 and 1956.

Section 905(a) of the Code determines when the credit may be taken and allows the taxpayer an election between the cash or accrual method of reporting. The United States credit for an uncontested foreign tax of course applies to the year in which the foreign tax was levied. In the event the foreign tax is contested by the taxpayer, the Internal Revenue Service has followed *Cuba R.R. v. United States,* 124 F. Supp. 182 (S. D. N. Y. 1954), which requires a taxpayer on an accrual basis to accrue a foreign tax liability as a credit against United States tax in the year in which this liability has been finally determined. However, this accrual has been allowed to "relate back" to the year in which the foreign tax was levied. Rev. Rul. 58-55, 1958-1 Cum. Bull. 266. Thus, if the taxpayer contests his liability for a foreign tax imposed on income in 1960, and this liability is finally adjudicated in the foreign country in 1965, "the credit may not be claimed until 1965 . . . , [but] the foreign tax imposed on 1960 income will be offset against the United States 1960 tax just as if it had accrued in 1960." Owens, *The Foreign Tax Credit* 5/3B2, at 328 (1961). obviously not meant as an incentive ot encourage such

For the Government's case it was only necessary to establish that Campbell had received unreported income and that this non-disclosure had resulted in a tax deficiency. *Elvert* v. *United States*, 231 F. 2d 928, 931 (9th Cir. 1956); *United States* v. *Bender*, 218 F. 2d 869 (7th Cir.,), *cert. denied*, 349 U. S. 920 (1955). In the present case, the Government established non-disclosure and at least the *prima facie* existence of a deficiency. At this point Campbell had the burden of going forward to negate the deficiency by showing that it was wrongly computed or was cancelled by another deduction or credit not yet allowed. *Elwert* v. *United States, supra; United States* v. *Bender, supra.*

Moreover, the foreign tax credit is "an act of grace on the part of Congress, and one who seeks the benefit of its provisions must plainly establish his right by showing that he has fulfilled all the conditions upon which the allowance of the credit is made to depend." *Irving Air Chute Co.* v. *Commissioner*, 143 F. 2d 256, 259 (2d Cir. 1944). In this context, the District Court correctly held that Campbell was not entitled to the foreign tax credit since he failed to make full and timely disclosure of his income from the Campbell-Chibougamau transactions and failed to enter a timely claim for the credit.

Section 905(b) of the Code establishes the manner in which the credit may be claimed and provides that a foreign tax credit will be allowed only if the taxpayer "establishes to the satisfaction of the Secretary [of the Treasury] or his delegate" the "total" amount of his foreign income, the foreign tax paid on that income, and "all other information necessary for the verification and computation" of the credit. In addition, section 905(c) gives the Secretary or his delegate discretion to require a bond from a taxpayer-claimant, whose foreign tax has accrued but has not yet been paid, to stand as security in the event the taxpayer later receives a refund under foreign law. The statute thus clearly indicates that a claim for the credit must be made promptly and that full disclosure of *all* foreign income must be made

in the taxpayer's initial *return* or by a prompt amendment. *Hygienic Prods. Co.* v. *Commissioner,* 111 F. 2d 330 (6th Cir.), *cert. denied,* 311 U. S. 665 (1940); *United Dyewood Corp.* v. *Bowers,* 44 F. 2d 399 (S. D. N. Y. 1930), *aff'd per curiam,* 56 F. 2d 603 (2d Cir. 1932). Nor does the statute distinguish between contested foreign tax levies and those which become final immediately.

This construction of the statute gains further support from Revenue Ruling 58-55. The retroactivity established in the Ruling seems to depend on timely and full initial disclosure of all foreign income. It would be contrary to the purpose of sections 901-905 to grant a credit against United States tax on income not concurrently taxed by a foreign government. It would be anomalous to allow criminal responsibility under United States law for an otherwise consummated crime to depend absolutely on the subsequent and possibly fortuitous imposition of tax liability under foreign law. *Willingham* v. *Commissioner,* 289 F. 2d 283 (5th Cir. 1961), *cert. denied,* 368 U. S. 829 (1961).

Campbell (in his brief) states well and succinctly the purpose of the foreign tax credit statutes, §§ 901, et seq., as follows:

> "The purpose of the foreign tax credit is to prevent double taxation of income which United States citizens earn abroad. Since the United States may and in most cases does tax its citizens on all of their income, wherever earned, those who earn income in foreign countries subject to foreign income tax may be subjected to the burden of double taxation."

However, after this statement he completely ignores the provisions of the statute as to how the credit is to be obtained. The credit in an income tax sense must be a credit against another tax on the same item if double taxation is to be avoided. Had Campbell, for example, reported his stock gains on his 1955 United States return and had shown a tax thereon of $200,000, he could have claimed

any Canadian tax thereon paid or accrued as a credit under item "8. Tax credits." But Campbell wholly failed to disclose the gain or any tax thereon against which a Canadian tax could have been a credit. Nor did he make any disclosure to the Canadian authorities. Campbell was not seeking to avoid double taxation. Rather, by concealment and playing one country against the other, he sought to avoid any taxation whatsoever on his large stock profits.[1] Now that his scheme has failed, he would have the courts on a *nunc pro tunc* basis rewrite his 1955 return as if he had reported his capital gains, calculated the tax thereon, had paid, or accrued on his books, a Canadian tax and had complied with the other requirements prescribed by law for the consideration and possible allowance of the claimed credit.

The Canadian document which he now offers to the effect that an appeal has been dismissed "for the reason that the

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[1] The facts of the present case indicate that such a gambit may have been attempted by Campbell. He never filed a United States return from 1945 through 1953. He also replied as follows to Canada's initial claim for taxes for 1954 and 1955:

August 22, 1956.

Department of National Revenue
Tax Division
400 Youville Square
Montreal, Canada

Gentlemen:

I was surprised to find your Tax Returns for the years 1954-55 awaiting my return to Montreal.

As you probably already know, I am, and always have been a citizen of the United States, and whatever income I earned in Canada, I included in my returns for the aforementioned years, which I filed in New York.

If there is any further information you desire, please be good enough to communicate with me.

Respectfully yours,

Ernest Campbell

assessment is deemed to be valid until the contrary is proven" falls far short of proving a Canadian tax paid or accrued on the proceeds of the stock sales. Since payment of the tax subsequent to the acts of evasion is no defense to prosecution therefor, *United States* v. *McCormick*, 67 F. 2d 867, 870 (2 Cir. 1933), *cert. denied*, 291 U. S. 662 (1934), so much the less should be this belated attempt to advance a credit theory (withheld even to the third day of the criminal trial) when no proof of payment, accrual or offer of payment was proffered. Only now is this court asked to take judicial notice of certain Canadian certifications annexed as an appendix to appellant's brief. Even were the court to do so, they would not satisfy the statutory requirements for a foreign tax credit.

The determination of criminal liability is the real issue at stake in the present case and not merely the question of Campbell's right to a foreign tax credit in a civil case. Nevertheless, the requirements of section 905 should not be construed as mere technicalities and thus disregarded since the credit could then be used as a device to create a haven for federal tax evasion. Under Campbell's construction of section 905, a United States citizen doing business abroad would merely be required to pay taxes already owned when and if the United States became aware of an irregularity in his tax return. A taxpayer in Campbell's position could not lose by his attempted evasion since he would be required merely to pay foreign taxes due (which he had heretofore avoided) immediately and without protest once he sensed that Internal Revenue was on his trail. In the alternative, the foreign tax could be paid or admitted immediately as Campbell states was the case for his Canadian liability for 1956) and a claim for the United States tax credit could be entered when the Internal Revenue Service became suspicious that foreign income had not been declared. He would then claim that the foreign tax had accrued within the meaning of the 1954 Code and that he was entitled to the retroactive credit as an absolute defense. The relief from double taxation provided by Congress was

obviously not meant as an incentive to encourage such reluctant taxpayers to conceal their income from both countries in the hope that their omission would be entirely overlooked. A prompt opportunity must be presented for the Government to determine the taxpayers' total foreign income and whether a credit will be allowed on the full amount of the income.

Campbell presented only two items of evidence to the District Court to establish his right to the credit: (1) a stipulation of fact between the parties which Campbell contends admitted that his Canadian liability had become final in 1961; and (2) a determination of his Canadian income tax for these years as set out in notices of the assessment of Canadian tax deficiencies.

Campbell presented no proof that these transactions took place in Canada. In fact, there is some indication in the record that some of these sales were actually made in New York. Campbell also adduced inadequate proof that his Canadian tax liability for 1955 and 1956 had been finally determined. The District Court correctly excluded the stipulation of fact as inconclusive and irrelevant since it was vaguely worded and said nothing specific about Campbell's tax liability for the years in dispute. The 1955 Canadian assessment notice does not constitute sufficient evidence of a final determination for that year since Campbell admits that he contested this tax assessment. Proof of his right to a credit in 1955 depends instead on an authenticated copy of a final Canadian judgment or other proof that the Canadian contest had been resolved. Campbell's 1956 Canadian assessment appears to have been uncontested but he never offered proof to the District Court that this assessment had in fact become final under Canadian law through his failure to enter an objection within the specified time. However, even accepting these assessments as beyond contest in Canada as assessments, they do not satisfy the paid or accrued requirement of our tax laws.

Campbell urges this Court to take judicial notice of several items of evidence of Canadian law, particularly rele-

vant to 1955, which he presents for the first time on appeal. However, judicial notice should not be used as a device to correct on appeal an almost complete failure to present adequate evidence to the trial court.

Campbell's arguments against the remaining counts of the indictment lack substance once his convictions on counts I and II are upheld. He argues as to count III that the Government erred in the transcription of bond transactions from brokerage lists to its summaries of these records offered in evidence and that the original records show that he had in fact purchased rather than sold 3% Government of Canada bonds in 1957 which would make it impossible for him to have received the interest as charged or to have declared it in 1957. However, as the Government notes in its brief, the transaction as shown on the original brokerage records could just as easily reflect the sale of the 3% bonds *from* Campbell to the broker and then *to* another customer. Furthermore, Campbell's contention that the Government's exhibits were transcribed in error was apparently not raised below and at best this issue was resolved against him by the jury.

Finally, Campbell argues that his revaluation and "sale" of his Ford Highwood Collieries stock was made in good faith and on the advice of his accountant. Campbell's characterization of his intent was obviously disbelieved by the jury. This was a reasonable finding in view of the details of the series of transactions involving the stock and of the pattern created by Campbell's reporting of his income for 1955-57. Furthermore, he offered no concrete evidence that he had consulted with an attorney concerning the Ford Highwood stock transaction or that he had made a full and frank disclosure of all the facts to counsel, even assuming that such legal or accounting advice was obtained before consummation of the transaction.

The facts relating to the purported sale of Campbell's Ford Highwood stock to his wife and the 1957 loss claimed thereon are so clearly fraudulent that they call for this

conclusion. Even as Campbell would place the blame for his tax derelictions upon his lawyer, so here does he endeavor to charge his accountant with improper advice. The proof is convincing as to the person responsible. The jury's verdict indicates that person.

Affirmed.

HAYS, *Circuit Judge*:

I concur in the result.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 698

ERNEST O. D. CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. 25–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 25) was entered on September 28, 1965. The petition for a writ of certiorari was filed on October 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal income tax prosecution the district court erred in holding that petitioner was not

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entitled to a credit for taxes allegedly "accrued" in favor of the Government of Canada.

STATUTES AND REGULATION INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

On April 12, 1962, a five-count indictment was filed against petitioner in the United States District Court for the Southern District of New York. Counts I, II, III and V charged that petitioner wilfully attempted to evade income tax for the years 1955 through 1958 by filing false and fraudulent tax returns which understated his income and tax. Count IV alleged that petitioner had made and used a false document (his 1957 income tax return), knowing it to contain a fictitious and fraudulent entry, in a matter within the jurisdiction of the Internal Revenue Service. (A.A. 2a–5a.) [1]

After a jury trial, petitioner was found guilty on all counts. On December 16, 1964, the court imposed concurrent prison sentences of one year and one day on each count and fined petitioner $5,000 each on counts I, II and IV. (A.A. 7a–8a.) The court of appeals affirmed. (Pet. 25–35.)

The evidence to support the verdict may be summerized briefly as follows:

Counts I and II. Although petitioner reported less than $9,000 of adjusted gross income on his 1955

[1] "A.A." refers to the Appellant's (petitioner's) Appendix in the court below. "G.A." refers to the Appellee's (government's) Appendix in the court below.

return, the government's figures showed that he had received adjusted gross income of $433,910.99, consisting mainly of a long-term capital gain from the sale of stock in Campbell-Chibougamau Mines, Ltd. (A.A. 109a, 138a, 150a; G.A. 15a–16a, 48a). For 1956 the comparable figures are $16,857.11 reported as against a true figure of $81,898.84, an understatement which again resulted mainly from profit on the sale of stock in Campbell-Chibougamau Mines, Ltd. (A.A. 138a, 150a; G.A. 50a). Petitioner does not deny that these gains should have been reported on his tax returns (Pet. 3), but claims that substantially all the federal income tax due as a result of these transactions would be offset by credits for taxes accrued in favor of the Government of Canada on the same income. However, the evidence at trial demonstrated that petitioner sold the stock in the names of nominees (A.A. 109a; G.A. 6a–11a, 27a–29a) and did not report the gains to the Canadian income tax authorities (A.A. 18a, 133a, 153a). Instead he advised the Canadian tax authorities in writing that he was a nonresident of Canada domiciled in New York City (G.A. 23a, 43a). After investigation the Canadian authorities uncovered the profits here in question and assessed a deficiency against petitioner (A.A. 18a, 133a, 153a), which still had not been paid at the time of the trial late in 1964 (A.A. 19a, 119a, 128a–129a).

Count III. The evidence indicates that in 1957 petitioner received $3,000 of unreported interest income on 3% Government of Canada bonds which he held until July of that year. (A.A. 26a–27a, 135a–

139a.) Petitioner did not deny receipt of this unreported income when he testified at the trial and does not seriously contend now that the proof in that regard is inadequate.

Counts IV and V. In 1957 petitioner listed an alleged capital loss of $113,342.09 purportedly on the sale of 133,000 shares of Ford Highwood Collieries, Ltd. (G.A. 52a). The "sale" was actually a transfer from petitioner to Elspeth Irvine—the maiden name of petitioner's wife—and the new stock certificate was delivered to petitioner himself. (G.A. 8a, 13a–14a, 37a, 60a.) Petitioner conceded on the witness stand that the sales price used in the transfer was "arbitrary" (G.A. 37a) and that he continued to invest money in the successor company (*id.*).

ARGUMENT

Inasmuch as the concurrent prison sentences were imposed with respect to each of the five counts, any error in Counts I and II—the only two counts petitioner seriously attacks in his petition—would affect only the amounts of the fines collectible. *Lawn* v. *United States,* 355 U.S. 339, 362; *Hirabayashi* v. *United States,* 320 U.S. 81, 85. There is, however, no merit in petitioner's contentions. The district court was clearly correct in holding as a matter of law that petitioner was not entitled to the foreign tax credit as an offset to the tax deficiencies on the unreported income from the sale of the stock of Campbell-Chibougamau Mines, Ltd.

1. Section 901 of the Internal Revenue Code of 1954 allows a taxpayer a credit against his federal income

tax liability for income taxes paid or accrued to a foreign government on income earned from sources outside the United States. The purpose of this provision is to prevent an American taxpayer from having to pay two taxes on the same income. *Associated Tel. & Tel. Co.* v. *United States*, 306 F. 2d 824 (C.A. 2), certiorari denied, 371 U.S. 950. In the instant case, however, it is clear that petitioner was not seeking to avoid double taxation, but to evade the taxes due *both* governments. Petitioner did not report his large profits on the Campbell-Chibougamau stock to either the United States or to the Canadian government. He would have been liable for Canadian tax on these gains only if he were a Canadian citizen, a resident of Canada, or had lived in Canada for more than 180 days (A.A. 18a). Petitioner had previously informed the Canadian government that he was a nonresident alien (G.A. 23a) and when in 1956 the Canadian Department of National Revenue sent him blank returns for one of the years here in question, he replied that he was "surprised" to find them because (G.A. 43a):

> As you probably already know, I am, and always have been a citizen of the United States, and whatever income I earned in Canada, I included in my returns for the aforementioned years [1954 and 1955], which I filed in New York.

Only after the United States had made a criminal case against him did he testify at his 1964 criminal trial that in his heart he had considered himself a resident of Canada until 1957 (G.A. 22a). The con-

clusion is inescapable that petitioner's subsequent admission of liability for 1955–1956 Canadian income taxes—none of which had been paid at the time of the trial (A.A. 19a, 119a, 128a–129a)—was made solely in an attempt to escape criminal liability for his attempted evasion. As the court below put it, the "relief from double taxation provided by Congress was obviously not meant as an incentive to encourage such reluctant taxpayers to conceal their income from both countries in the hope that their omission would be entirely overlooked." (Pet. 32–33).

It is clear that during 1955 and 1956 petitioner had no intention of paying the Canadian taxes. In these circumstances no Canadian tax can be said to have accrued in 1955 and 1956 within the meaning of Section 901. Cf. *United States* v. *Consolidated Edison Co.*, 366 U.S. 380; Rev. Rul. 58–55, 1958–1 Cum. Bull. 266.[2]

2. Regardless of whether the Canadian taxes can be said to have accrued in 1955 and 1956, the Code requires a taxpayer to make certain disclosures and take certain acts before he will be entitled to a credit for accrued but unpaid foreign taxes. In order to prevent taxpayers from claiming credits for foreign taxes they have not paid, and may never pay, the Code specifically states that such "credits * * * shall be

[2] It is irrelevant for the purpose of this case whether, if petitioner eventually pays the Canadian tax, he will be entitled to a deduction or credit and, if a credit, whether it will be considered to relate back to his 1955 and 1956 tax years. See Rev. Rul. 58–55, 1958–1 Cum. Bull. 266. The important fact here is that the foreign tax liabilities cannot be said to have accrued in 1955 and 1956.

allowed only if the taxpayer establishes to the satisfaction of the Secretary [of the Treasury] or his delegate * * * the amount of income derived from each country, the tax paid or accrued * * * which is claimed as a credit, * * * and * * * all other information necessary for the verification and computation of such credits," and gives the Secretary or his delegate the power to require "as a condition precedent to the allowance of this credit" that "the taxpayer * * * give a bond" to cover any tax which may become due if the taxpayer fails to pay the foreign tax. Internal Revenue Code of 1954, § 905 (b), (c). During the tax years here in question petitioner supplied the Commissioner with no information regarding the alleged Canadian taxes. His returns disclosed neither the existence nor the amount of the gains on the sale of the stock and the Canadian tax, all of which the statute specifically required him to disclose in order to qualify for the credit.

Indeed the statute is clear that the Commissioner may require a taxpayer who is claiming credit for an accrued but unpaid foreign tax to post a bond to cover the U.S. tax which may be due in case the taxpayer fails to pay the foreign tax, thus defeating the credit. It is equally clear that if the taxpayer fails to post the required bond, the credit will be disallowed. By deliberately failing to inform the Commissioner that he was claiming a credit for an unpaid foreign tax, petitioner prevented the Commissioner from requiring him to post a bond. If a taxpayer's failure to post a bond when requested by the Commis-

sioner to do so defeats the credit, certainly a taxpayer's deliberate failure to inform the Commissioner that he is claiming a credit for accrued but unpaid foreign taxes should have the same effect.

3. Since petitioner was not entitled to the foreign tax credit, there is no merit in the argument that the jury should have been permitted, under the doctrine of *Sansone* v. *United States*, 380 U.S. 343, to find him not guilty of wilfully attempting to evade his taxes under Section 7201 of the Code but guilty of wilfully filing a return which he knew to be false under Section 7207.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

APPENDIX

Internal Revenue Code of 1954:

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) *Allowance of credit.*

If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax again which the credit is allowable * * *.

(b) *Amount allowed.*

Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) Citizens and domestic corporations.

In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *

* * * * * *

[26 U.S.C. 901.]

SEC. 905. APPLICABLE RULES.

(a) *Year in which credit taken.*

The credits provided in this subpart may, at the option of the taxpayer and irrespective of

the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued, subject, however, to the conditions prescribed in subsection (c). If the taxpayer elects to take such credits in the year in which the taxes of the foreign country or the possession of the United States accrued, the credits for all subsequent years shall be taken on the same basis, and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year.

(b) *Proof of credits.*

The credits provided in this subpart shall be allowed only if the taxpayer establishes to the satisfaction of the Secretary or his delegate—

(1) the total amount of income derived from sources without the United States, determined as provided in part I,

(2) the amount of income derived from each country, the tax paid or accrued to which is claimed as a credit under this subpart, such amount to be determined under regulations prescribed by the Secretary or his delegate, and

(3) all other information necessary for the verification and computation of such credits.

* * * * *

(c) *Adjustments on payment of accrued taxes.*

If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Secretary or his delegate, who shall redetermine the amount of the tax for the year or years affected. The amount of tax due on such redetermination, if any, shall be paid by the taxpayer on notice and demand by the Secretary or his delegate,

or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with subchapter B of chapter 66 (sec. 6511 and following). In the case of such a tax accrued but not paid, the Secretary or his delegate, as a condition precedent to the allowance of this credit, may require the taxpayer to give a bond, with sureties satisfactory to and to be approved by the Secretary or his delegate, in such sum as the Secretary or his delegate may require, conditioned on the payment by the taxpayer of any amount of tax found due on any such redetermination; and the bond herein prescribed shall contain such further conditions as the Secretary or his delegate may require. * * *
[26 U.S.C. 905.]

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
[26 U.S.C. 7201.]

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.
[26 U.S.C. 7207.]

18 U.S.C. 1001. STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Treasury Regulations on Income Tax:

Sec. 1.905–2. *Conditions of allowance of credit.*

(a) ***Forms and information.***—(1) Whenever the taxpayer chooses, in accordance with paragraph (d) of § 1.901–1, to claim the benefits of the foreign tax credit, the claim for credit shall be accompanied by Form 1116 in the case of an individual or by Form 1118 in the case of a corporation.

(2) The form must be carefully filled in with all the information called for and with the calculations of credits indicated. Except where it is established to the satisfaction of the district director that it is impossible for the taxpayer to furnish such evidence, the form must have attached to it (i) the receipt for each such tax payment if credit is sought for taxes already paid or (ii) the return on which each such accrued tax was based if credit is sought for taxes accrued. This receipt or return so attached must be either the original, a duplicate original, a duly certified or authenticated copy, or a sworn copy. In case only a sworn copy of a receipt or return is attached, there must be kept readily available for comparison on request the original, a duplicate original, or a duly certified or authenticated copy. If the

receipt or the return is in a foreign language, a certified translation thereof must be furnished by the taxpayer. Any additional information necessary for the determination under part I (section 861 and following), subchapter N, chapter 1 of the Code, of the amount of income derived from sources without the United States and from each foreign country shall, upon the request of the district director, be furnished by the taxpayer.

(b) *Secondary evidence.*—Where it has been established to the satisfaction of the district director that it is impossible to furnish a receipt for such foreign tax payment, the foreign tax return, or direct evidence of the amount of tax withheld at the source, the district director, may, in his discretion, accept secondary evidence thereof as follows:

(1) *Receipt for payment.*—In the absence of a receipt for payment of foreign taxes there shall be submitted a photostatic copy of the check, draft, or other medium of payment showing the amount and date thereof, with certification identifying it with the tax claimed to have been paid, together with evidence establishing that the tax was paid for taxpayer's account as his own tax on his own income. If credit is claimed on an accrual method, it must be shown that the tax accrued in the taxable year.

(2) *Foreign tax return.*—If the foreign tax return is not available, the foreign tax has not been paid, and credit is claimed on an accrual method, there shall be submitted—

(i) A certified statement of the amount claimed to have accrued,

(ii) Excerpts from the taxpayer's accounts showing amounts of foreign income and tax thereon accrued on its books,

(iii) A computation of the foreign tax based on income from the foreign country

carried on the books and at current rates of tax to be established by data such as excerpts from the foreign law, assessment notices, or other documentary evidence thereof,

(iv) A bond, if deemed necessary by the district director, filed in the manner provided in cases where the foreign return is available, and

(v) In case a bond is not required, a specific agreement wherein the taxpayer shall recognize its liability to report the correct amount of tax when ascertained, as required by the provisions of section 905(c).

If at any time the foreign tax receipts or foreign tax returns become available to the taxpayer, they shall be promptly submitted to the district director.

* * * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1968

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 698

ERNEST O. D. CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUGGESTION OF MOOTNESS

We have been informed by petitioner's counsel that petitioner died on November 29, 1965. Accordingly, it is suggested that the case has become moot and that the petition for a writ of certiorari should be denied. Cf. *Ford* v. *United States*, 355 U.S. 38; *Dillon* v. *United States*, 350 U.S. 906; *Singer* v. *United States*, 323 U.S. 338, 346; *United States* v. *Johnson*, 319 U.S. 503, 520.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

205-842—66 U.S. GOVERNMENT PRINTING OFFICE:1966